Supreme Court, U.S.
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(3)

No. 98-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 1998
PETITION FOR CERTIORARI GRANTED JANUARY 15, 1999

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RELEVANT DOCKET ENTRIES

1	9/19/95	COMPLAINT & JURY DEMAND
2	9/25/95	ORDER by Judge Sanda S. Beckwith Case referred to Mag. Judge Robert A. Steinberg
3	11/13/95	ANSWER by defendants Med Corrections Sys, Sally Remilard and Joseph Spriggs; jury demand
4	11/17/95	ANSWER by defendants Hamilton County OH and Simon Leis; jury demand
5	2/15/96	ORDER by Judge Sandra S. Beckwith Case referred to Mag Judge Lynn V. Hooe
10	7/1/96	MOTION by defendant Med Corrections Sys to compel the Estate to respond in full to CMS 1st set of interrogatories, and to extend time to ID Expert Witnesses
18	7/9/96	MOTION by defts Med Corrections Sys, Sally Remilard and Joseph Spriggs to disqualify Teresa Cunningham as counsel for pltf
20	7/9/96	MOTION by defts Hamilton County OH and Simon Leis to disqualify Teresa Cunningham as counsel for pltf
26	7/12/96	ORDER by Mag Judge James Cook. In re: motion to disqualify Brian Hurley as counsel for Joseph Spriggs [25-1] dft to file response by 7/29/96 and pltf to reply by 8/9/96; granting in party and denying in part motion for protective order [24-1], denying motion to quash subpoena [24-2]; in re: motion for order

that it may call Joseph Rowan as an expert witness [21-1] dfts to file resonse [sic] by 7/17/96 and pltf to reply by 7/22/96; granting motion to extend time for pltf to ID expert witnesses [21-2], denying motion to disqualify Teresa cunningham as counsel for pltf [20-1], granting in part and denying in part motion for protective order [19-1], granting in part and denying in part motion for protective order [17-1], granting motion for order vacating defts expert witness identification ddl of 7/19/96 [16-1], granting motion to compel the Estate to respond in full to CMS 1st set of interrogatories [10-1], granting motion to extend time to ID Expert Witnesses [10-2]

27 7/16/96 NOTICE by Magistrate Cook of Follow up hearing regarding order of Court on 7/12/96 set for 10:00 am on 7/19/96

28 7/16/96 MOTION by plaintiff to compel defts. J. Spriggs & S. Remilard to appear for depo on 7/25/96, to depose Rex Smith in Indianapolis, and for sanctions

29 7/16/96 NOTICE by plaintiff of taking deposition of Rex Smith on 7/22/96 at 4 pm

30 7/16/96 MOTION by defendant Hamilton County, OH, defendant Simon Leis for protective order, and for sanctions

31 7/17/96 MOTION by defts Med Corrections Sys, Sally Remilard and Joseph Spriggs for protective order, and for sanctions

32 7/17/96 MOTION by defendant Med Corrections Sys to enforce order of 7/12/96, and for sanctions

34 7/17/96 MOTION by defendants to quash subpoena issued to Rex Smith for depo on 7/22/96

37 7/19/96 CIVIL MINUTES: Proceeding before Mag Judge James Cook on various motions; Teresa L. Cunningham present for pltf; Brian Edward Hurley, Philip Lewis Zorn, Jr. & Shannon M. Reynolds present for dfts; Pltfs counsel requested motion be granted to depose Rex Smith in Indianapolis, IN; Defts counsel, Messrs Hurley & Zorn, requested Court order of 7/12/96 be enforced and sanctions be granted against pltfs counsel for failure to comply with Court's order; Pltf's counsel directed to serve suppl answers to first set of Interragatories [sic] within 10 days of today's hearing; Sanctions granted against pltfs counsel Dfts counsel to submit cost and charges for appearance and preparation of hearing to Court for ruling; Depos of Rex Smith, Joseph Spriggs & S. Remilard to go forward as agreed to by parties as such place as appropriate

38 7/22/96 ORDER by Mag Judge James cook denying motion to compel defts J. Spriggs & S. Remilard to appear for depo on 7/25/96 [28-1], denying motion for sanctions [28-3] granting motion for protective order [30-1] granting motion for protective order [31-1] granting motion to enforce order of 7/12/96 [32-1] granting motion to quash subpoena issued to Rex Smith for depo on 7/22/96 [34-1] granting motion for sanctions [30-2],

granting motion for sanctions [31-2], granting motion for sanctions [32-2]

54 8/2/96 OBJECTIONS by plaintiff to Magistrate Cook's 7/19/96 Order (not yet filed with Court)

63 8/6/96 MOTION by defendant Med Corrections Sys, defendant Sally Remilard, defendant Joseph Spriggs to disqualify Teresa Cunningham

77 8/22/96 ORDER by Mag Judge James Cook denying motion to disqualify Teresa Cunningham as counsel for pltf [18-1]

88 9/12/96 MOTION by defendants Hamilton County OH and Simon Leis to disqualify Teresa L Cunningham as counsel for pltf

94 9/20/96 ORDER by Mag Judge James Cook that the response to County defts Second Motion to Disqualify Teresa Cunningham as counsel for pltf [88] shall contain statement informing Court whether she intends to continue as counsel for pltf or be a witness at trial for pltf and defining status of Douglas Marr Mansfield in this case

99 9/25/96 ORDER by Mag Judge James Cook that pltf's counsel pay to Crabbe, Brown, Potts & Schmidt, Cinti OH counsel for defts Correctional Medical Systems Inc, Remillard and Spriggs the sum of $2,432 as costs & Atty fees in re hearing on 7/19/96 (Doc. 37) and order on 7/22/96 (doc. 38); pltf's counsel pay to Treasurer, Hamilton Co OH the sum of $1,494 in costs and atty fees incurred by

Prosecuting Atty, Hamilton Co OH as counsel for defts in re hearing on 7/19/96 (Doc 37) and the order of 7/22/96 (Doc. 38); pltf's counsel's request for a stay of this order pending appeal is denied.

109 10/7/96 MEMORANDUM by plaintiff in opposition to motion to disqualify T. Cunningham as counsel for pltf [88-1]

110 10/7/96 OBJECTIONS by plaintiff to Magistrate's Order of 9/25/96 [99-1]

110 10/7/96 MOTION by plaintiff for expedited hearing, and to stay payment of sanctions pending appeal

114 10/9/96 AMENDED COMPLAINT by plaintiff; jury demand adding Kathy Brown as pltf

127 10/22/96 ORDER by Judge Sandra S. Beckwith affirming the decision of the Magistrate Judge dated July 19 September 5 September 25 and September 30 documents [38-1] [85-1] [86-1] [99-1] [105-1] are affirmed; granting motion to disqualify Teresa Cunningham as counsel for pltf [88-1] denying motion to strike motion to disqualify Teresa Cunningham [63-1] [67-1] denying motion for protective order [106-1], denying motion to quash [106-2], denying motion for sanctions [106-3] denying motion for further sanctions [73-1], denying memorandum [73-1] denying motion for sanctions [74-1], denying memorandum [74-1]; defendants may take deposition of Teresa Cunningham on or before October 31, 1996. Ms Cunningham is directed to attend

deposition scheduled by defendants and defendants are instructed to consult with Ms Cunningham in order to identify a mutually agreeable time and date for the deposition. Ms Cunningham is advised to respond to questions posed to her at such a deposition unless she is unable to do so in light of the attorney-client privilege. Dispositive Motions may be filed on or before November 4, 1996. Opposing memorandum must be filed and served, via hand delivery or facsimile on or before November 19, 1996. Reply memorandum must be filed and served, via hand delivery or facsimile on or before November 29, 1 996 [sic]. The Court will conduct the final pretrial conference in this matter as scheduled on December [sic] 1996

133 11/1/96 MOTION by movant Teresa Cunningham to stay collection of sanctions pending appeal

134 11/1/96 NOTICE OF APPEAL by movant Teresa Cunningham from Dist. Court decision [127-1] of 10/22/96

138 11/7/96 CIVIL MINTUES: Hearing on motions (133 & 136) held before Judge Sandra S. Beckwith. Lou Sirkin & Laura Abrams enter appearance on behalf of Ms. Cunningham. Arguments held. Re: doc. 136; defts. Are to specify docs. Requests. Pltf. is to produce or assert privilege. The Court will review privileged docs. In camera (pltf. must provide a privilege log). Re: doc. 133: A stay is GRANTED pending conclusion of this case and any appeal.

142 11/22/96 Deposition of Theresa [sic] Cunningham with SEALED EXHIBITS ATTACHED taken 11/8/96 by pltf

148 12/9/96 CIVIL MINUTES: Hearing before Judge Sandra S. Beckwith on motion to withdraw as attorney [147-1] and motion to extend time to respond to defts motion for summary judgment [146-1]; Pltf indicated attorney Mr Newman to review file by 12/11/96 & report whether he will appear on behalf of pltf's in substitution of attorney Mansfield; Deft represented by attorney Hurley requested that case be dismissed with prejudice; Pltf's motion to dithdraw [sic] (Doc. 147) is granted; defts request fees for all matters concerning MS [sic] Cunningham; Court instructs deft to file motions for sanctions should they choose to do so; defts do not intend to file a response to doc 146 or a further response in support of motion to dismiss. FPTC & Trial dates are vacated.

187 10/9/97 ORDER by Judge Sandra S. Beckwith granting motion for summary judgment [142-1] by defendants Correctional Med Sys, Sally Remilard, and Joseph Spriggs as to Counts I and II of the amended complaint, granting motion for summary judgment [143-1] by defendants Hamilton County OH, and Simon Leis as to Counts I and II of the amended complaint, Defts motions for summary judgment with respect to Counts III, IV, and V of the amended complaint are deemed moot and pltfs state law claims are dismissed without prejudice, finding the motion to strike appendix to pltfs memo in opposition to defts

for summary judgment [169-1] moot[], finding the motion to dismiss case with prejudice [185-1] moot.

190 11/7/97 NOTICE OF APPEAL by plaintiff from Dist. Court decision [187-1] of 10/9/97

198 12/4/97 ORDER OF US COA 6th Circuit dismissing the appeal [190-1] for want of prosecution

200 3/23/98 OPINION AND ORDER by Judge Sandra S. Beckwith granting motion for monetary sanctions [Doc. 118]; Ms Teresa Cunningham directed to pay CMS $29,000.00 in the form of certified check or money order by 4/30/98; Clerk directed to enter judgment against Ms Cunningham and close this case terminating case

201 3/23/98 JUDGMENT by CLERK entered against Ms Teresa Cunningham pursuant to Order of the Court [Doc. 200] in the amount of $29,000.00 made payable to CMS in the form of a certified check or money order payable to CMS's counsel on or before 4/30/98

202 4/21/98 NOTICE OF APPEAL by movant Teresa Cunningham from Dist. Court decision [201-1] of 3/23/98

204 5/8/98 MOTION by movant Teresa Cunningham to stay enforcement or collection of judgment pending appeal of judgment

211 7/22/98 ORDER by Judge Sandra S. Beckwith denying motion to stay enforcement and or

collection of judgment pending appeal of judgment [204-1]

213 7/30/98 ORDER OF USCA 6th: that motion to reinstate appeal is granted

214 8/14/98 MANDATE OF USCA 6th: dismissing the appeal [202-1]

215 8/3198 ORDER OF US COA 6th Circuit dismissing appeal [Doc. 202] pursuant to notice of voluntary dismissal filed by parties

216 9/23/98 NOTICE of Satisfaction of Judgment against Teresa Cunningham by defts Correctional Med Sys, Sally Remilard, and Joseph Spriggs [201-1]

217 9/24/98 SATISFACTION OF JUDGMENT against Teresa Cunningham [201-1]

219 1/26/99 LETTER to Court from Supreme Court of The United States[]; Petition or a writ of certiorari is granted limited to question one presented by the petition

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN LEE STARCHER,
Plaintiff
vs Case No. C-1-95-815
MEDICAL CORRECTIONS (Beckwith, J.)
SYSTEMS, INC. et. al
Defendants

ORDER

This matter is before the Court on plaintiff Darwin Lee Starcher's motion to compel and for sanctions (Doc. 28), defendant Hamilton County, Ohio's second motion for protective order and for sanctions (Doc. 30), defendants Medical Correction Systems (CMS), Remilard, and Spriggs' motions for protective order and to enforce (Docs. 31, 32), and defendants' joint motion to quash (Doc. 34). This Court held a hearing on these motions on July 19, 1996. After reviewing the record and hearing arguments by the parties, the Court hereby ORDERS the following:

1) that plaintiff's motion to compel and for sanctions (Doc. 28) is DENIED;
2) that defendant Hamilton County's motion for protective order prohibiting the deposition of Rex Smith noticed for July 22, 1996 in Indianapolis, Indiana (Doc. 30) is GRANTED such that the deposition will not go forward;
3) that defendants CMS, Spriggs, and Remilard's motion for protective order to prohibit Rex Smith's deposition noticed for July 22, 1996 in Indianapolis, Indiana (Doc. 31) is GRANTED and their motion for protective order to prohibit

the depositions of Spriggs and Remilard noticed for July 25, 1996 is GRANTED;
4) that defendants CMS, Spriggs, and Remilard's motion to compel full and complete responses to defendants' first set of interrogatories and request for documents (Doc. 32) is GRANTED; and
5) that defendants' joint motion to quash the subpoena requiring Rex Smith to appear for deposition on July 22, 1996 in Indianapolis, Indiana (Doc. 34) is GRANTED.

Plaintiff is FURTHER ORDERED to serve supplementary answers to defendants' first set of interrogatories and request for documents WITHIN TEN DAYS of the date of the hearing on this matter.

The depositions of defendants Remilard and Spriggs shall go forward no sooner than THIRTEEN days after plaintiff has served defendants with the above-ordered supplementary responses. The depositions of defendants Spriggs and Remilard are to be scheduled by agreement of the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure. The deposition of Rex Smith may go forward on a date and in a place agreed upon by the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure.

Because the Court finds that plaintiff has effectively violated this Court's order of July 12, 1996, defendants' motions for sanctions are GRANTED. Within THIRTY DAYS counsel for defendants are to submit to the Court appropriate statements indicating their reasonable fees and expenses for their court appearance on these motions and their preparation for today's hearing. Defendants shall serve copies

of these statements on plaintiff. The Court will consider these statements before ruling upon the sanctions to be imposed.

SO ORDERED.

Date: [7-19-96]
James F. Cook
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN STARCHER,
Plaintiff
vs Case No. C-1-95-815
MEDICAL CORRECTIONS
SYSTEMS, INC. et. al,
Defendants J. Beckwith

ORDER

This Order addresses the imposition of sanctions in the form of reasonable expenses, including attorney's fees, to be imposed against plaintiffs' counsel in regard to the hearing that was conducted before the undersigned on July 19, 1996. In this ruling the Court will determine the amount of such expenses to which defendants are entitled. A review of the record leading up to the July 19th hearing is appropriate.

An informal discovery conference was held by the undersigned with all counsel on July 10, 1996 and resulted in the entry of a formal order dated July 11, 1996 and entered on July 12, 1996. (Doc. 26). This order directed, *inter alia*, that the plaintiff make full and complete responses to defendants' First Set of Interrogatories and Document Requests by 4:00 p.m. on July 12, 1996; that certain depositions, including that of Rex Smith, be taken on July 25, 1996; and that the depositions of defendants Remillard and Spriggs go forward on July 25, 1996 only if plaintiff had made full and complete responses to defendants' First Set of Interrogatories and

Document Requests by 4:00 p.m. on July 12, 1996. It should be noted that plaintiff's counsel was advised of and understood the July 12th , 4:00 p.m. deadline at the conference on July 10th.

On July 16, 1996, plaintiff filed a Motion to Compel Defendants Spriggs and Remillard to Appear for Depositions on July 25, 1996, to Depose Rex Smith in Indianapolis, Indiana and for Sanctions. (Doc. 28). It is argued in this motion that plaintiff complied with the July 12th, 4:00 p.m. deadline on responses to the defendants' Interrogatories and Requests for Production of Documents, yet defendants Spriggs and Remillard, by their attorney, have stated that they will not appear for their depositions; and that Rex Smith was located in Indianapolis and that he would be unavailable for his deposition in Cincinnati on July 25th, that his deposition had, therefore, been rescheduled by plaintiff's counsel for July 22nd in Indianapolis and a subpoena issued by plaintiff's counsel to that effect. Sanctions against defendants Spriggs and Remillard were sought for their alleged failure to obey the July 12th order.

A Notice to Take Deposition was issued by plaintiff's counsel on July 15th noticing the deposition of Rex Smith in Indianapolis on July 22nd. (Doc. 29).

On July 16, 1996 the County Defendants filed a Second Motion for Protective Order and for Expenses, Fees and Sanctions. (Doc. 30). The grounds for the motion are that the action of plaintiff's counsel in scheduling the Smith deposition in Indianapolis on July 22nd was a violation of the Court's July 12th order which directed that the deposition be taken on July 25th, that it was the clear understanding of all counsel that the deposition would be taken on that date in plaintiff's counsel's office in Cincinnati. Also, it was alleged that the subpoena issued to Smith was not valid in that it was issued out of this Court rather than the U.S. District court in Indianapolis.

Expenses including attorney's fees were requested pursuant to F.R. Civ. P. 26(c) and 37(a)(4).

The CMS, Remillard and Spriggs Defendants also filed a Motion for Protective Order and Sanctions. (Doc. 31). This motion was filed on July 17, 1996 and sought a protective order prohibiting the taking of the Smith deposition on July 22nd and the taking of the Remillard and Spriggs depositions on July 25th. The grounds for the motion are that the unilateral action of plaintiff's counsel in noticing the Smith deposition for July 22nd in Indianapolis violated the Court's July 12th order, and that plaintiff's responses to the First Set of Interrogatories and Document Requests were not full and complete in violation of the July 12th order so that the depositions of Remillard and Spriggs should not go forward on July 25th. The legal expenses and costs of these defendants incurred in bringing the motion were sought.

Also on July 17, 1996 the CMS Defendants filed a Motion to Enforce Order and for Sanctions. (Doc. 32). By this motion these defendants asked for an order compelling compliance with the July 12th order relating to plaintiff's responses to the defendants' Interrogatories and Document Requests and for reasonable expenses, including attorney's fees in obtaining such order.

All defendants filed a joint motion on July 17, 1996 to quash the subpoena issued to Rex Smith for his deposition on July 22nd in Indianapolis (Doc. 34), basically on the same grounds as set forth in the other motions filed in connection therewith.

The defendants, respectively, filed responses to the plaintiff's Motion to Compel which is noted above. (Doc. 35 and 36).

In view of the apparent urgency of these motions the Court scheduled them for hearing on July 19, 1996 and did conduct such hearing on that date. All counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record. (Doc. 47).

The undersigned made the following rulings on the motions: the plaintiff's Motion to Compel was denied; the motion of the County Defendants for a protective order prohibiting the deposition of Rex Smith at Indianapolis on July 22nd was granted; the motion of the CMS Defendants was also granted in that respect and prohibiting the taking of the depositions of defendants Remillard and Spriggs on July 25th; the motion of the CMS Defendants and Remillard and Spriggs requiring plaintiff to serve full and complete answers to the defendants' First Set of Interrogatories and Request for Documents was granted as was the defendants' joint motion to quash the Smith subpoena.

Further directives for the serving of supplemental responses by plaintiff to the interrogatories and document requests were included in the order, as well as for the taking of the depositions of defendants Remillard and Spriggs and the witness Rex Smith.

The Court concluded that plaintiff's counsel had not complied with the July 12th order, but had violated same. The motions of the defendants for protective order and sanctions were granted and counsel were directed to submit to the Court their respective statements of charges and costs that were necessitated by filing their motions and attending the hearing. (Doc. 38 and 47).

The authority for the action taken by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants' motions for protective orders were granted after a

hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

The CMS, Remillard and Spriggs defendants have filed a Memorandum and Statement Supporting Amount Sought in Sanctions. (Doc. 46). The County Defendants have also filed a similar Memorandum, Statement and Affidavit Supporting Amount Sought as Sanctions. (Doc. 50). Plaintiff has filed a responsive Memorandum to each of these papers. (Doc.s [sic] 52, 53). The CMS Defendants have filed a Reply (Doc. 55) and a Motion to Strike (Doc. 56). The County Defendants have filed a Reply. (Doc. 72).

The Memorandum of Defendants CMS, Remillard and Spriggs (Doc. 46) sets out a claim in the total amount of $2928.00, which is calculated on the basis of 14.3 hours of work from July 12, 1996 through July 22, 1996 as follows:

Brian E. Hurley	13.90 hrs. at $200=	2780.00
Kathy McGarvey Hidy	.40 hrs. at $140-	56.00
Total Fees:		$2836.00
Also included are:	Copying Costs	85.40
	Postage	6.60
	Total Expenses:	92.00
	Grand Total:	$2928.00

The affidavit of Brian E. Hurley provides a breakdown of the attorney's hours claimed in this matter and identifies the character of the work performed. Mr. Hurley and Ms. Hidy are private practitioners.

The Memorandum of the County Defendants (Doc. 50) sets out their claim in the total amount of $1,690.50 which is calculated on the basis of 11.27 hours of work from July 15, 1996 through July 24, 1996 by attorney Philip L. Zorn, Jr., at $150.00 per hour. An affidavit of Mr. Zorn is attached which provides a breakdown of the hours and character of the work performed. Mr. Zorn is an Assistant Prosecuting Attorney for Hamilton County, Ohio.

Plaintiff's responses (Doc. 52 and 53) set forth objections to the Court's order of sanctions and award of attorney's fees and to the amounts claimed by defendants' counsel, respectively. It is argued that plaintiff's counsel was denied due process because she didn't have adequate time to prepare a defense; that the time claimed by Attorney Hurley is exaggerated; that the defendants' motions are duplicative; that the hourly rate claimed by Attorney Hurley is excessive; that the time claimed by Attorney Zorn is exaggerated and that the hourly rate claimed by Attorney Zorn is excessive.

Having carefully considered the matters now before the Court and the papers filed with regard thereto, it is the opinion and finding of the undersigned that the defendants are entitled to recover forthwith the amounts, with certain adjustments, claimed by them as reasonable expenses including attorney's fees incurred in relation to the motions brought before the Court on July 19, 1996. The Court finds that plaintiff's attorney's conduct necessitated the preparation and filing of the defendants' motions and responses to plaintiff's motion and necessitated the hearing on July 19, 1996. Further, the Court finds that the objections relied upon by plaintiff in the responses (Doc. 52, 53) are not well taken and do not provide a

basis for relief from the sanctions ordered by the Court. As just indicated, however, certain adjustments will be made in relation to the amounts claimed.

The July 19th hearing was not a contempt hearing and plaintiff's counsel was not found to be guilty of contempt. The defendants' motions for a protective order were heard pursuant to Rule 26(c), F.R. Civ. P. and the sanctions were imposed pursuant to Rule 37(a)(4), F.R. Civ. P. Plaintiff's counsel appeared at the hearing and presented her argument on all the motions. She neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare.

The schedule of hours submitted by counsel for the CMS, Remillard and Spriggs defendants (Doc. 46, p. 2) will be revised by the Court to eliminate the first two items dated July 12, 1996 and July 15, 1996, respectively. The activity described therein would appear to have been necessary in the ordinary course of reviewing the discovery matters then under consideration. The .40 hours and 2.20 hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total number of hours for which payment is to be made is 11.70 hours. The hourly rate of $200.00 for Mr. Hurley appears reasonable and will be allowed. Accordingly, the amount of payment to be made to counsel for these defendants attorney's fees is $2,340.00. The expenses in the amount of $92.00 are allowed, making a total payment of $2,432.00.

Also, the schedule of hours submitted by counsel for the County defendants (Doc. 50, pp. 6-7) will be revised by the Court to eliminate those items listed under the date of July 15, 1996. That activity would likewise appear to have been necessary under the existing circumstances. The total of 1.31

hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total amount of hours for which payment is to be made is 9.96 hours. The hourly rate of $150.00 for Mr. Zorn appears reasonable and will be allowed. The total amount of payment to be made as attorney's fees for the County Defendants is $1,494.00.

The argument of plaintiff's counsel that the services of counsel for the defendants, respectively, are duplicative is misplaced. There are two distinct sets of defendants, each represented by separate attorneys. Each of those attorneys was entitled to proceed in such manner as would best represent his defendants with respect to the serious discovery dispute that had developed. Each of these attorneys did, it is not surprising, proceeding a similar manner pursuant to the Federal Rules of Civil Procedure. That they filed similar motions on similar grounds is not surprising either, and does not, in the opinion of the Court, constitute duplication of work for which compensation should not be made. Inasmuch as the conduct of plaintiff's counsel created the dilemma with which the defendants' attorneys were faced, it is not a detraction from their work effort that they may have conferred in relation to the course of action to be taken.

Plaintiff's counsel requests s [sic] stay of this order pending an appeal. That request will be denied. The Court considers the conduct of plaintiff's counsel to be egregious.

Accordingly, It Is Ordered that:

1. Plaintiff's counsel forthwith pay to Crabbe, Brown, Potts & Schmidt, Cincinnati, Ohio, counsel for defendants Correctional Medical Systems, Inc., Remillard and Spriggs, the sum of $2,432.00 as costs and attorney's fees in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc. 38).

2. Plaintiff's counsel forthwith pay to the Treasurer, Hamilton County, Ohio, the sum of $1,494.00, representing costs and attorney's fees incurred by the Office of the Prosecuting Attorney, Hamilton County, Ohio, as counsel for the County Defendants herein in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc. 38).

3. The request of plaintiff's counsel for a stay of this order pending appeal is DENIED.

Date: [9-25-96]

James F. Cook
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kathy Brown,	)	
	)	
Plaintiff,	)	
	)	Case No. C-1-95-815
vs.	)	
	)	
Correctional Medical Systems,	)	
Inc., et al.,	)	
	)	
Defendant.	)	

ORDER

This matter, which has already consumed an inordinate amount of the Court's time, is now before the Court upon a number of motions, appeals from orders of the Magistrate Judge, and requests for sanctions. The Court will dispose of each motion, appeal, and request in this Order to the extent that it is fully briefed.

1. Appeals from Orders of Magistrate Judge Cook

For several months, ending on September 30, 1996, visiting United States Magistrate Judge James Cook monitored this litigation and ruled on discovery related motions. That task assumed the qualities of a full time occupation as the parties filed documents at a frenzied pace. Predictably, Plaintiff has appealed several of the Magistrate Judge's rulings.

Each of the orders from which Plaintiff appeals addresses a nondispositive, discovery-related issue. This Court may only reverse an order of a magistrate judge in a discovery

matter upon a finding that the order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P. 72(a).

a. Sanctions against Teresa Cunningham

Pursuant to an Order dated July 19, 1996, Magistrate Judge Cook concluded that Plaintiff's counsel, Teresa Cunningham, had failed to comply with requests for discovery and that her conduct had necessitated intervention by the Court in the discovery process. The Magistrate Judge concluded that sanctions, pursuant to Rule 37(a)(4)(A) of the Federal Rules of Civil Procedure, were appropriate. Pursuant to an Order dated September 25, 1996, the Magistrate Judge set the amount of the sanctions based upon submissions by Defendants' counsel regarding their fees and expenses in preparing the motions to compel discovery. Plaintiff appeals from the July 19 and the September 25 Orders.

Ms. Cunningham's conduct clearly necessitated the motions to compel resulting in the Magistrate Judge's Order compelling responses to interrogatories and requests for production. Accordingly, sanctions were mandated, pursuant to Rule 37(a)(4)(A), which is, essentially, self-executing in the event that a motion to compel is granted. The Magistrate Judge did not err in concluding that sanctions were appropriate.

The Magistrate Judge awarded sanctions in the amount of attorney's fees and expenses related to the motions to compel. Rule 37(a)(4)(A) specifically provides for sanctions in that amount. Accordingly, the amount of the Magistrate Judge's award was not contrary to law.

Ms. Cunningham argues that the Magistrate Judge erred by permitting inflated fees and permitting both groups of Defendants to recoup fees for similar activities. The Court does not find the award to be clearly erroneous on those

grounds. Ms. Cunningham has not established that the Magistrate Judge's assessment that the requested fees were reasonable is clearly erroneous or contrary to law. Ms. Cunningham has also failed to establish that the two groups of Defendants, who have separate interests in this litigation and are represented by separate counsel, should not recoup attorney's fees and expenses to the extent that the work performed for each group was similar. Obviously, each group of Defendants was required to act in its own interests in light of Plaintiff's failure to respond to discovery requests. By failing to respond, Ms. Cunningham assumed the risk that both groups of Defendants would incur fees and expenses in petitioning the Court to compel discovery. The Magistrate Judge's Orders (Docs. 54 and 110) are hereby AFFIRMED.

b. Expert Witnesses

By Order dated September 5, 1996, Magistrate Judge Cook ruled that Harvey Rosen would not be permitted to testify as an expert witness in Plaintiff's behalf. The Magistrate Judge observed that the expert disclosure deadline had been extended and that Plaintiff had disclosed Mr. Rosen as a witness during the extended period. The Magistrate Judge further observed, however, that the deadline had been extended only for the purpose of permitting Plaintiff to identify a corrections expert to replace a previously disqualified corrections expert. Concluding that Plaintiff was well aware that the deadline had not been extended for other purposes, the Magistrate Judge excluded Mr. Rosen, who is an economist.

Plaintiff was not entitled to disclose experts after the deadline for doing so. Plaintiff had not disclosed an expert economist as of that deadline. The Magistrate Judge extended the deadline, but in his September 5 Order he set forth his finding that Plaintiff knew that the purpose of the extension was only to permit the identification of a corrections expert. Obviously, if the extension was thus restricted, Plaintiff cannot argue that other experts could properly be disclosed during the extended period. In any event, Plaintiff has not demonstrated that the September 5 Order was clearly erroneous or contrary to law, and the Order is hereby AFFIRMED.

Plaintiff also appeals from the Magistrate Judge's September 30, 1996 Order pursuant to which he denied Plaintiff's motion to extend the deadline for identifying expert witnesses. The decision whether to extend such a deadline, particularly when the discovery deadline in the case has passed, is within the discretion of the Magistrate Judge. Plaintiff has not demonstrated that the Magistrate Judge's failure to extend the deadline in this case was clearly erroneous or contrary to law. Accordingly, the Magistrate Judge's September 30 Order is hereby AFFIRMED.

c. The Spriggs Memorandum

Shortly before the suicide death of Casey Starcher, Plaintiff's counsel, Teresa Cunningham, and Defendant Joseph Spriggs, an employee of Defendant Correctional Medical Systems, Inc., spoke to one another by telephone concerning Mr. Starcher. Within days after Mr. Starcher's death, Defendant Spriggs drafted a memorandum to his supervisor, Jean Jones, concerning his conversation with Ms. Cunningham.

Plaintiff moved to compel production of the Spriggs memorandum. Magistrate Judge Cook denied the motion on

the ground that the document was prepared in anticipation of litigation and Plaintiff had failed to demonstrate that the requirements of Rule 26(b)(3) of the Federal Rules of Civil Procedure were satisfied with respect to the memorandum.

Plaintiff appeals on three grounds. First, Plaintiff contends that the Magistrate Judge erred in concluding that the memorandum was prepared in anticipation of litigation. Second, Plaintiff contends that substantial need has been demonstrated, contrary to the Magistrate Judge's finding. Third, Plaintiff contends that Plaintiff cannot obtain the substantial equivalent of the memorandum without undue hardship.

The Magistrate Judge concluded, based upon the affidavits in the record concerning the circumstances in which Defendant Spriggs drafted the memorandum, that the memorandum was prepared in anticipation of litigation. That conclusion is supported by evidence in the record, and the Court does not conclude that it was clearly erroneous or contrary to law.

Pursuant to Rule 26(b)(3), the Court may only compel the production of the memorandum upon a showing by Plaintiff of substantial need and an inability to obtain the substantial equivalent of the memorandum without undue hardship. The Magistrate Judge found that Plaintiff did not make such a showing. The Court concludes that that finding was neither clearly erroneous nor contrary to law.

Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs, during the telephone conversation in question, that Casey Starcher was suicidal and that recent developments in his state criminal case made a suicide watch particularly appropriate. Defendant Spriggs denied that Ms. Cunningham provided such information during their telephone conversation.

Plaintiff has had the opportunity to depose Defendant Spriggs concerning his recollection of the telephone conversation. The evidence in the record indicates that the memorandum also contains Defendant Spriggs recollection of the telephone conversation. Accordingly, Plaintiff has had the opportunity to obtain the substantial equivalent of the memorandum without undue hardship and has not demonstrated a substantial need for the memorandum. The Magistrate Judge's Order of September 5, 1996 is, therefore, AFFIRMED.

2. Motions Concerning Teresa Cunningham as Counsel

As the Court has observed, Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs in a telephone conversation shortly before Casey Starcher's suicide that Mr. Starcher was suicidal and that recent events made a suicide watch advisable. Defendant Spriggs has denied that Ms. Cunningham provided that information during the telephone conversation. Defendants have moved to disqualify Ms. Cunningham as counsel for Plaintiff in light of the likelihood that she will be called as a witness for Plaintiff. Ms. Cunningham has opposed the motions, has moved to strike one of the motions, and has refused to inform the Court whether she intends to testify, even when the Court has explicitly ordered her to do so. Ms. Cunningham has also moved for a protective order and to quash Defendant's subpoena duces tecum.

Plaintiff has not identified a viable alternative to Ms. Cunningham's testimony. Ms. Cunningham is the only witness to the telephone conversation in question other than Defendant Spriggs who denies Plaintiff's allegations concerning the content of the conversation. Without engaging in a thorough analysis of Plaintiff's claims, the Court believes that the allegations concerning the contents of the conversation are

essential to some or all of Plaintiff's claims. Accordingly, if Plaintiff intends to prove those claims, Ms. Cunningham will be required to testify to her recollection of the telephone conversation with Defendant Spriggs.

Disciplinary Rule 5-101 of the Code of Professional Responsibility, which is binding upon Ms. Cunningham as a member of the Ohio bar, provides, in pertinent part, as follows:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Disciplinary Rule 5-102 provides, in pertinent part, as follows:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B)(1) through (4).

Ethical Consideration 5-9 elaborates upon the potential conflict created when an attorney acts as both witness and counsel:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 explains that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

This Court recognizes that motions to disqualify counsel should be considered with extreme caution, in view of the litigant's interest in retaining counsel of the litigant's choice and the danger that an opposing party may use a motion to disqualify to obtain a tactical advantage. See Paretti v. Cavalier Label Co., Inc., 722 F. Supp. 985 (S.D. N.Y. 1989); see also Evans v. Artek Systems Corp., 715 F.2d 788, 791-92

(2d Cir. 1983). The Court also recognizes that care must be taken before disqualifying an attorney since interlocutory appeals are generally unavailable from such orders. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); In re Mechem, 880 F.2d 872 (6th Cir. 1989). Nevertheless, neither the United States Court of Appeals for the Sixth Circuit nor the Supreme Court of Ohio has hesitated to rule that an attorney whose testimony would cause a conflict under DR 5-101(B) or DR 5-102 must either voluntarily withdraw from the case or face disqualification. General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982); Mentor Lagoons, Inc. v. Rubin, 31 Ohio St.3d 256, 260 (1987).

In this case, the Court concludes that Teresa Cunningham cannot continue as counsel for Plaintiff in light of her role as witness. The Court recognizes that Ms. Cunningham has not conceded that she will testify. As the Court has observed, however, Plaintiff has not identified a means of proving the alleged version of the telephone conversation other than by Ms. Cunningham's testimony. Accordingly, it is "obvious", for purposes of the Disciplinary Rules, that Ms. Cunningham ought to be called as a witness, and the Court ascribes no credibility to her equivocation concerning her intentions. Defendants' motions to disqualify Ms. Cunningham as counsel for Plaintiff (Docs. 63 and 88) are, therefore, GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify (Doc. 67) is DENIED.

Ms. Cunningham has submitted a motion for a protective order, to quash a subpoena issued by Defendants, and for sanctions (Doc. 106) related to attempts by counsel for Defendants to depose her. Ms. Cunningham's arguments in support of that motion are based upon her previous status as counsel for Plaintiff. Because she is no longer Plaintiff's counsel, the issues raised by her motions are predominately moot. Defendants may depose her, and she is obligated to respond to the extent that she may do so without disclosing

privileged information. Her motions related to Defendants' attempts at discovery (Doc. 106) are hereby DENIED.

3. Conclusion

The Orders of visiting United States Magistrate Judge James Cook dated July 19, September 5, September 25, and September 30, 1996 (Docs. 38, 85, 86, 99, and 105) are hereby AFFIRMED. Defendants' motions to disqualify Teresa Cunningham as counsel for Plaintiff (Docs. 63 and 88) are hereby GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify Ms. Cunningham (Doc. 67) is hereby DENIED. Ms. Cunningham's motions for protective order, to quash, and for sanctions (Doc. 106) are hereby DENIED. The motions of Hamilton County and Correctional Medical Systems for sanctions (Docs. 73 and 74) are hereby DENIED.

Defendants may take the deposition of Teresa Cunningham on or before October 31, 1996. Ms. Cunningham is DIRECTED to attend a deposition scheduled by Defendants, and Defendants are INSTRUCTED to consult with Ms. Cunningham in order to identify a mutually agreeable time and date for the deposition. Ms. Cunningham is ADVISED to respond to questions posed to her at such a deposition unless she is unable to do so in light of the attorney-client privilege. Counsel for Defendants may contact the Court in the event that difficulties arise in the scheduling or execution of Ms. Cunningham's deposition.

Dispositive motions may be filed on or before November 4, 1996. Opposing memoranda must be filed and served, via hand delivery or facsimile, on or before November 19, 1996. Reply memoranda must be filed and served, via hand delivery or facsimile, on or before November 29, 1996.

The Court will conduct the final pretrial conference in this matter as scheduled on December 13, 1996.

IT IS SO ORDERED.

_____

Sandra S. Beckwith
United States District Judge

No. 96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARWIN LEE STARCHER,	)
	)
Plaintiff,	)
	)
TERESA CUNNINGHAM,	)
	)
Attorney-Appellant,	)
	)
v.	)
	)
MEDICAL CORRECTIONS SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, Sheriff; SALLY REMILARD; Administrator of Correctional Medical Systems; JOSEPH SPRIGGS, Employee of Correctional Medical Systems,	)
	)
Defendants-Appellees.	)

Before: MERRITT, CONTIE, and BOGGS, Circuit Judges.

ORDER

The plaintiff's attorney appeals from an interlocutory order imposing sanctions under Rule 11, Fed. R. Civ. P. The defendants move to dismiss the appeal for lack of a final, appealable order. The appellant-attorney opposes the motion to dismiss and requests sanctions be imposed against the defendants for filing the motion to dismiss.

There is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable. *Compare Appeal of Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distributors, Inc. v. Maico-Fahzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene National Bank*, 822 F.2d 544 (5th Cir. 1987); *Howard v. Mail-Well Envelope Co.*, 90 F. 3d 433 (10th Cir.), *cert. denied*, 117 S.Ct. 484 (1996); *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Sanders Associates, Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993); *with* Morley *v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810 (11th Cir. 1992). In light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised.

It therefore is ORDERED that the motion to dismiss is denied at this time. The appellants' request for sanctions is also denied. The parties are directed to address the court's jurisdiction in their appellate briefs.

ENTERED BY ORDER OF THE COURT

_____

Clerk

DARWIN LEE STARCHER and
KATHY BROWN, Plaintiffs,
TERESA CUNNINGHAM, Attorney-Appellant,
v.
CORRECTIONAL MEDICAL SYSTEMS, INC.;
HAMILTON COUNTY, OHIO; SIMON LEIS,
individually and in his capacity as Sheriff;
SALLY REMILARD; and JOSEPH SPRIGGS,
Defendants-Appellees.

No. 96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

May 21, 1998, Filed

COUNSEL: ARGUED: Teresa L. Cunningham, Cincinnati, Ohio, for Appellant.

ARGUED: Philip L. Zorn, Jr., HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

JUDGES: Before: BOGGS, MOORE, and FARRIS,* Circuit Judges. BOGGS, J., delivered the opinion of the court, in which FARRIS, J., joined. MOORE, J., delivered a separate dissenting opinion.

BOGGS, Circuit Judge.

Attorney Teresa Cunningham's appeal requires us to opine on an issue that has divided our sister circuits: whether an attorney who eventually withdraws or is disqualified from a case may take an immediate, interlocutory appeal from an

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

order in that case levying attorney's fees and costs against her for discovery violations. We believe the better view to be that an attorney in these circumstances may not take an immediate appeal, but rather must wait to file an appeal until final judgment is entered in the case. Because we lack jurisdiction to entertain this interlocutory appeal, we cannot disturb the order assessing attorney's fees and costs against Cunningham.

I

On September 19, 1995, Cunningham (a sole practitioner) filed suit under 42 U.S.C. § 1983 against defendants Correctional Medical Systems, Inc. ("CMS"), two CMS employees, Hamilton County, Ohio, and the Hamilton County sheriff. The complaint Cunningham filed on behalf of plaintiff Darwin Lee Starcher alleged that the defendants negligently failed to supervise Starcher's son Casey, despite his known history of suicide attempts, and thus violated Casey's constitutional rights. Casey committed suicide while incarcerated in the Hamilton County jail.

In March 1996, the magistrate judge assigned to the case entered a scheduling order. The scheduling order required that the plaintiff designate experts by June 7, 1996, and that the defendants designate experts by July 19, 1996. It also set a discovery cut-off date of September 16, 1996, and a deadline of October 16, 1996, for filing dispositive motions. Cunningham's representation was fraught was difficulties even from the earliest days of this litigation. To begin with, it was apparent early in the case that Cunningham might be a material witness in the case because she spoke to a CMS official about Casey Starcher's psychiatric condition just a few days before Casey's suicide. For that reason, on four separate occasions the defendants moved to disqualify Cunningham as counsel. The magistrate judge denied the first three of these motions.

While she was opposing these motions to disqualify, Cunningham also managed to get into serious discovery trouble. The defendants served Cunningham with interrogatories and document requests on May 29, 1996. Under Fed. R. Civ. P. 33 and 34, Cunningham had 30 days to respond to these discovery requests. On June 7, 1996, however, Cunningham informed defense counsel that she could not respond to the discovery requests because Darwin Lee Starcher, the administrator of Casey Starcher's estate, had died. Efforts to resolve the matter informally were rebuffed by Cunningham, as evidenced by an exchange of letters between Cunningham and defense counsel. Because the defendants were under a court order to disclose their experts and expert materials by July 19, 1996, the defendants moved on July 1, 1996, to compel production of the plaintiff's written discovery. Cunningham was served with this motion on July 1.

On July 10, 1996 -- at which point the plaintiff's discovery responses were already 10 days overdue -- the magistrate judge held a discovery conference to consider various pending discovery disputes, including the delinquency of the plaintiff's written discovery. At this conference, the magistrate judge ordered the plaintiff "by 4:00 p.m. on July 12, 1996 to make full and complete responses to the First Set of Interrogatories and Document Requests To Plaintiff." Further, the magistrate judge ordered the depositions of two witnesses for the plaintiff (Rex Smith and Roxanne Dieffenbach) and two defendants (Remilard and Spriggs) to take place on July 25, 1996, with the proviso that the depositions of the defendants would go forward only if the plaintiff had complied with written discovery obligations by July 12, 1996.

As things turned out, the plaintiff -- or, more to the point, Cunningham -- did not comply with either of these orders. With respect to the order to serve interrogatory responses by July 12, Cunningham responded merely with blanket objections, with incomplete responses, or, in some

cases, with no response at all. As for Cunningham's response to the defendants' document requests, defendants argue that Cunningham produced no documents at all, and the record does not reflect any written response to the document requests such as would be required under Fed. R. Civ. P. 34(b). With respect to the magistrate judge's order that depositions take place on July 25, to the defendants' great consternation Cunningham noticed the deposition of Rex Smith for July 22. The defendants immediately notified Cunningham that Smith could only be deposed on July 25, as ordered by the court.[1] Nonetheless, Cunningham refused to withdraw her deposition notice and the defendants resorted to filing a motion for protective order. Simultaneously, the defendants moved for an award of the attorney's fees they incurred in seeking court intervention to force Cunningham to comply with the earlier discovery order.

The magistrate judge scheduled a hearing for July 19, 1996. Cunningham attended this hearing, along with counsel for all defendants. At the hearing, Cunningham argued that she should be excused for failing to comply with her discovery obligations both because the defendants had served "contention" interrogatories,[2] the answers to which allegedly depended on documents to be produced by the defendants, and because her client had died and the new administrator of the Starcher estate was not returning her telephone calls. The only

[1] Cunningham testified that the reason she did not contact defense counsel to work out a compromise was that she "knew from prior experience from working with them that it wouldn't do any good; it would be a waste of time."

[2] "Contention" interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required. *See, e.g., Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1997).

reason Cunningham gave for noticing a deposition on a date different from the date previously ordered was that defense counsel would not consent to a change in the time and location of the deposition. Significantly (as explained below), Cunningham did not ask for additional time to prepare a defense to the motion for fees and costs, nor did she object to the timing of the hearing.

After hearing from all counsel, the magistrate judge ruled for the defendants on all issues. In particular, he issued a new order requiring Cunningham to supplement her discovery responses with full and complete responses within 10 days, he granted the defendants' motion for a protective order quashing the notice of depositions of the two defendants until Cunningham's discovery responses were received, and he granted defendants' motions for fees and costs, instructing defense counsel to file a bill of costs. The magistrate judge then received memoranda from the parties concerning the propriety of the fee award against Cunningham. In her memorandum, Cunningham argued (1) that the defendants' motions for fees and costs were received only shortly before the hearing before the magistrate judge, (2) that the magistrate judge's original July 10, 1996, order, requiring discovery responses by July 12th, gave her only two days within which to respond to discovery (despite the fact that she actually had the entire period from May 29th through July 12th to file responses), and (3) that the amount of requested attorney's fees was too high.

The magistrate judge rejected these arguments. He noted that the July 19th hearing had been scheduled on short notice "in view of the apparent urgency of these motions." He also stated that "all counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record." The magistrate judge then stated that:

> The authority for the [fees and costs imposed] by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants' motion for protective orders were granted after a hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants [sic] counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

With these findings in mind, the magistrate judge ordered Cunningham to pay $2928.00 in attorney's fees, copying costs, and postage to CMS, and $1690.50 in attorney's fees to the county defendants. The magistrate judge further noted that Cunningham "neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare." In closing, the magistrate judge stated that "the Court considers the conduct of plaintiff's counsel to be egregious." Over Cunningham's objections, the district court affirmed the magistrate judge's award of fees and costs. Simultaneously, the district court granted the defendant's motion to disqualify Cunningham as plaintiff's counsel. This appeal followed.

II

A

The final judgment rule, reflected in 28 U.S.C. § 1291, has deep roots in American law. *See Cobbledick v. United States*, 309 U.S. 323, 326 (1940) (noting origin of final judgment rule in Judiciary Act of 1789). Both to ensure the integrity of the trial process and to improve the efficiency of the judicial system, the final judgment rule essentially provides that interlocutory orders entered by a trial court -- such as discovery orders entered during pretrial proceedings, or evidentiary rulings made during trial -- may not be reviewed by an appellate court until the trial court enters a final judgment disposing of all claims at issue in the case.[3] More than 90 years ago, a unanimous Supreme Court held that an order compelling the production of discovery materials is a non-appealable interlocutory order. *See Alexander v. United States*, 201 U.S. 117 (1906). In *Alexander*, the Supreme Court recognized that "in a certain sense finality can be asserted" as to such orders, but only in the same sense that "finality can be asserted of any order of a court." *Id.* at 121. The Court therefore laid down a general rule governing the appealability of discovery orders: an individual subject to a discovery order can either obey the order, or can refuse to comply and face punishment for contempt. Because a contempt judgment is personal to the individual resisting the discovery order, and is considered final as to that individual, an immediate appeal is available. *See id.*

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[3] The principal exceptions to the final judgment rule are, first, Fed. R. Civ. P. 54(b), which permits a trial court to direct the entry of a "final judgment" in a case even though that judgment will not dispose of all claims (or will dispose of all claims, but not as to all parties) in the case; second, 28 U.S.C. § 1292(b), which permits an appeal from an interlocutory order if the trial court certifies that the order raises a controlling question of law as to which there is substantial ground for difference of opinion, and if the appellate court exercises its discretion to hear the appeal; and third, the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which permits the interlocutory review of certain collateral orders that conclusively determine a disputed question, that resolve an important issue, and that would be effectively unreviewable on appeal from a final judgment.

at 122. In *Alexander*, however, rather than openly resist a discovery order, the appellants simply appealed the order. The Supreme Court dismissed the appeal for want of jurisdiction because there was no final judgment as to the appellants. *See ibid.*

Alexander remains the general rule governing appeals from discovery orders.[4] However, the Supreme Court has carved out an exception for a "small class" of discovery and other interlocutory orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). Our task today is to decide whether an order requiring the plaintiff's attorney to pay to defense counsel the costs incurred as a result of moving to compel discovery qualifies as a member of the "small class" of immediately appealable collateral orders contemplated in *Cohen*.

In addressing this question, two prefatory comments are required. First, while we are sympathetic to the plight of Ms. Cunningham, who may, as a practical matter at this late date, have no avenue for appellate review other than this proceeding,[5] the mere fact that she may be unable to obtain appellate review does not enter into our jurisdictional analysis. As the unanimous Supreme Court has said, "the right to a judgment from more than one court is a matter of grace and not

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[4] The Supreme Court's adherence to the *Alexander* procedure for obtaining appellate review of discovery orders has been unswerving. *See Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992); *United States v. Ryan*, 402 U.S. 530 (1971).

[5] The underlying case has been dismissed by the district court since this appeal was filed, and Cunningham did not file a notice of appeal from the order dismissing the case.

a necessary ingredient of justice. Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick*, 309 U.S. at 325. Second, our subjective assessment of the importance, if any, of the underlying issues raised by Cunningham's appeal also cannot enter into our analysis. The Supreme Court has declined to extend the collateral-order doctrine to cover appeals from judgments of even the most sweeping import. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (holding class-certification order not appealable under *Cohen*); *cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (recognizing broad significance of class-certification orders and noting that writ of mandamus was required to obtain appellate review of such an order).

B

The precise question presented today is whether Cunningham, an attorney representing the plaintiff who was disqualified as counsel during the course of the litigation below, has a right to an immediate appeal from an order imposing attorney's fees and costs on her because her opponents were forced to move for an order compelling her to comply with a previous discovery order. To qualify as an immediately appealable collateral order under *Cohen*, this order would have to conclusively determine the disputed question (here, Cunningham's liability for attorney's fees and costs), resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal. It is beyond dispute that the first *Cohen* factor is satisfied here; accordingly, we focus our attention on factors two and three.

The circuits have divided over the question of whether a discovery order directed at an attorney participating in the underlying lawsuit raises issues "completely separate from the

merits of the action."[6] Five circuits have held that orders similar to the order at issue in this case (including orders imposing sanctions under Fed. R. Civ. P. 11, orders assessing attorney's fees under Fed. R. Civ. P. 37, and others) are so completely separate from the merits of the underlying action as to be immediately appealable by the attorney subject to the order. *See Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 (11th Cir. 1992); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Med. Svcs, Inc.*, 855 F.2d 1470, 1472-73 (9th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985); *Cheng v. GAF Corp.*, 713 F.2d 886, 889 (2d Cir. 1983). Five other circuits have come to the opposite conclusion. *See Sanders Assocs., Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564, 569-70 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981).

Because our circuit has not yet stepped into these cross-currents, we are especially mindful of *Cohen*'s dictum that practical considerations are paramount in deciding whether a particular kind of order qualifies for immediate appeal under the collateral order doctrine. *See Cohen*, 337 U.S. at 546. In this regard, it is telling that even some of those circuits that initially embraced the idea that an attorney could immediately appeal an order imposing discovery sanctions have since recognized its significant potential for disruption of the trial process. The Second Circuit, for example, recently noted that

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[6] We recognize, of course, that Cunningham was no longer participating in the case at the time she filed this appeal; she had been disqualified as counsel on the same day the district court affirmed the magistrate judge's order imposing attorney's fees and costs against her. We discuss the question of whether this distinction matters in Section II.C, *infra*.

its precedent permitting attorneys immediately to appeal sanctions orders led to a "flurry of arguments, charges and countercharges, motions and cross-motions and other papers in the district court" that "effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying . . . litigation." *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997). In light of the practical effects of its precedent, the court went so far as to say that "were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions order here as nonappealable under the *Cohen* doctrine." *Ibid.* Similarly, the Seventh Circuit recently acknowledged that its precedents permitting immediate appeals by sanctioned attorneys "have not played to universal acclaim," and noted that extension of these precedents "would produce a substantial, and unjustified, erosion of the final-decision requirement." *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997).

In short, several circuits have experimented with the "immediate appeal" rule urged by Cunningham, and the experience has not been positive. We therefore are not persuaded that the issues presented by an appeal such as Cunningham's reliably could be deemed completely separate from the merits of the underlying case. It is conceivable, of course, that in an extreme case where an attorney provides absolutely no response to discovery, the issue of the attorney's compliance with a discovery order would not implicate any merits issues. But here, Cunningham provided responses to at least some of the defendants' discovery requests, and presumably her challenge to the district court's Rule 37 order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits. We therefore conclude that the issues involved in Cunningham's appeal likely would not turn out to

be "completely separate" from the merits of the underlying case.

C

Our dissenting colleague argues that the crucial fact entitling Cunningham to an immediate appeal is that she was disqualified as counsel in the underlying case and that, therefore, her appeal is lexically "separate" from the issues involved in the underlying case. *See infra* at 18-20. On this issue too, the circuits are split. Of the five circuits (First, Third, Fifth, Tenth, and Federal) that refuse to permit a participating attorney to file an immediate appeal under the collateral order doctrine, two have held nevertheless that an attorney who has withdrawn from representation in the underlying case is entitled to an immediate appeal. *See Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985). By contrast, one of these circuits has specifically reached the opposite conclusion. *See Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir.), *cert. denied*, 117 S. Ct. 84 (1996).[7]

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[7] In addition, the D.C. Circuit recently held that a non-participating law firm was not entitled to an immediate appeal of a discovery order. *See In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). While the law firm in that case was never involved in a representative capacity in the underlying case (it was instead the target of a civil subpoena), the fact that the firm was not deemed entitled to an immediate appeal provides strong further support for the proposition that the attorney's involvement or lack of involvement in the underlying case cannot be dispositive in determining whether the attorney is entitled to an immediate appeal. Surely if an attorney who was never involved in a case is not sufficiently "separate" from the case to warrant immediate appellate review, an attorney (like Cunningham) who was involved but subsequently is disqualified cannot be entitled to an immediate appeal.

We believe the better view is that a non-participating attorney, like a participating attorney, ordinarily must wait until final disposition of the underlying case before filing an appeal. For one thing, it would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (order disqualifying counsel in civil case not immediately appealable under collateral order doctrine). Moreover, from a practical perspective, there are serious administrative problems with a rule that hinges on whether the attorney subject to the discovery order is a participating or non-participating attorney. Here, by sheer fortuity, it happens that the order affirming the magistrate judge's order that Cunningham pay attorney's fees was issued on the same day as the order disqualifying Cunningham from the case. We can easily conceive of cases where this does not happen -- where, for example, an attorney is ordered pursuant to Rule 37 to pay attorney's fees associated with a discovery dispute, and then does not withdraw or become disqualified as counsel for months or years afterward. In such a case, when would the 30-day filing period of Fed. R. App. P. 4 begin to run -- from the date of the Rule 37 order, or from the date of withdrawal? Either outcome strikes us as fraught with difficulty.

Expanding the collateral order doctrine to cover cases like Cunningham's seems particularly unwise at a time when requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses. Creating a distinction between participating and non-participating attorneys could add another tactical arrow to the arsenal; litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case. For all these reasons, we decline to adopt a distinction between participating

and non-participating attorneys for purposes of the collateral order doctrine.

D

Because Cunningham's appeal does not satisfy the second element of the *Cohen* test, we need not address the third element -- whether the order would be effectively unreviewable absent an interlocutory appeal -- in any great detail. As on the other dimensions of this case, the circuits are divided fairly evenly between those that believe a sanctioned attorney satisfies the third *Cohen* factor and those that do not. This circuit split is somewhat puzzling in light of the Supreme Court's recognition that orders awarding attorney fees are appealable independent of the disposition of the merits of the underlying case. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988). We see no reason why, after final resolution of the underlying case (whether the resolution be a judgment for plaintiff, a judgment for defendant, or an out-of-court settlement), a sanctioned attorney should be unable to appeal the order imposing sanctions. Of course, if the person involved is a non-participating attorney, this may require her to monitor the progress of the litigation with some care. This fact does not change our analysis of the third *Cohen* factor, however; it is important not to "improperly blur the line between the impossibility of effective review necessary under the *Cohen* doctrine and [the] mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal." *Howard*, 90 F.3d at 437.

III

For the foregoing reasons, we conclude that we have no jurisdiction over Cunningham's appeal. Therefore, the appeal is DISMISSED.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I write separately to highlight the unnecessarily broad brush the majority uses to paint on this otherwise narrow canvas. Specifically, I harbor grave concerns regarding three facets of the majority opinion. First, the majority holds that sanctions orders, such as the one appealed from in this case, fail to satisfy the second *Cohen* element requiring that the merits of the underlying litigation be separate from the sanctions order.[1] *See* Slip Op. at 9-12. Second, the majority rejects any distinction between those attorneys who are and those who are not participating in the underlying litigation, despite the weight of authority accepting this distinction. Finally, the majority ignores the inequity of applying its new rule, retroactively, to bar a merits review of the issues raised by Cunningham in this appeal. *See* Slip Op. at 8, n.5.

In my view, Cunningham's appeal satisfies the second *Cohen* requirement in that the sanctions order is separate from the merits of the underlying action. Although in some instances sanctions orders may be intertwined with the merits, none of these circumstances are present in this case. For example, in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990), the plaintiff's lawyer failed to turn over notes requested by the defendant's lawyer and then used those notes at trial. The district court sanctioned the plaintiff's lawyer for failing to produce the notes to defendant's counsel. On appeal, the Tenth Circuit held that the sanctions arose from a discovery dispute over the relevance of the notes. Accordingly, any evaluation of relevancy would necessarily require the court to examine the merits of the underlying action. The court thus concluded that the attorney's appeal failed to satisfy the *Cohen* requirements and should await a final judgment in the case. *Accord Eastern*

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[1] In dictum, the majority notes that maybe in an "extreme case" the sanctions order "would not implicate any merits issues." Slip Op. at 12.

Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H., 658 F.2d 944, 947 (3d Cir. 1981) (dismissing appeal for failure to satisfy *Cohen* requirements where review of sanctioning of attorney for filing dilatory discovery motions required examination of relevance to underlying dispute). *Cf. Evanson v. Union Oil Co. of California*, 619 F.2d 72 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980) (sanctioned party requested appellate court to vacate district court's sanction order for lying in interrogatory answers, and court of appeals refused where determining truth or falsity of answers would require it to evaluate the merits of the underlying action).

Contrast the holdings in the preceding cases with the holding in *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989). In that case, the magistrate judge imposed monetary sanctions on an attorney under Rule 37 for failure to provide complete answers to interrogatories and for failure to produce requested documents, and the district court affirmed the sanctions order. On appeal, the Second Circuit concluded that the appeal satisfied the second *Cohen* requirement "since the imposition of the sanction involves an issue completely separate from the merits of the underlying litigation." *Id.* at 685 (quotation omitted).

The facts presented in Cunningham's appeal more closely resemble the facts in *Thomas E. Hoar, Inc.* than those facts presented in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson*. Specifically, unlike the appellants in those cases, Cunningham does not contend that her failure to answer the discovery turned on the relevance or scope of the discovery, or that her answers were true where the district court found them to be false. Those kinds of contentions could have required this court to evaluate the merits of the underlying action to determine if the interrogatories were relevant, covered an appropriate time frame, or whether Cunningham's responses were in fact true. As the courts in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson* correctly concluded, any such

evaluation of the merits would by its very nature run afoul of *Cohen*'s requirement that the sanctions order and the merits be "completely separate."

Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments against the sanctions order involve the substance of the discovery itself. Consequently, like the appellant's due process objection in *Thomas E. Hoar, Inc.*, resolution of Cunningham's timing and due process objections to the sanctions order would not compel us to address the merits of the underlying action. Therefore, Cunningham's appeal satisfies the second *Cohen* requirement. In my view, the majority opinion needlessly forecloses the possibility that some sanctions orders, not just those in an "extreme case," will not be intertwined with the merits and thus will satisfy the second *Cohen* requirement.

Next, the majority rejects the participating and non-participating attorney distinction. However, of the five circuits to consider this issue explicitly, four have found this distinction persuasive. *Compare Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) ("As a general rule an attorney must await the end of litigation in the district court to appeal a sanction . . . . However, we recognize[] an exception to this rule in those situations in which the sanctioned attorney is no longer involved in the case and an appeal of the sanctions order would not impede the underlying litigation."); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985) (holding that a sanctioned attorney who has withdrawn from the representation may take an interlocutory appeal under *Cohen*); *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 731 (9th Cir. 1995) (sanctioned counsel who has withdrawn from the representation may take

an interlocutory appeal under *Cohen*); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984) (same), *with Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir. 1996) (rejecting interlocutory appeal of sanctions order by withdrawn attorney).

With respect to *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), cited by the majority in a footnote, that case did not address the issue of whether a sanctioned attorney who has withdrawn or been disqualified from representing a party to the underlying action may immediately appeal the sanctions order. Instead, that case addressed the issue of whether a law firm subjected to a subpoena duces tecum relating to a case in another district court in which it was not a party could immediately appeal an order of a federal district court transferring the case to that other federal district court. The D.C. Circuit held the law firm could not immediately appeal such an order, but must either disobey the order, be cited for contempt, and then appeal the contempt order, or must file a petition for a writ of mandamus. *See id.* at *1. In that case, the law firm proceeded by way of a mandamus petition. Accordingly, the *Sealed* case, which focuses on a peripheral issue, provides little support for the Tenth Circuit's position in *Howard* denying an immediate appeal of the sanctions order to a sanctioned attorney who no longer represents a party in the underlying action, a position that is contrary to the weight of published authority.

The Tenth Circuit bases its restrictive position on the ground that a sanctioned attorney no longer connected to the underlying action may appeal at the conclusion of that action, whether the court issues a final judgment, or the parties settle the case. Thus, the Tenth Circuit holds the sanctioned attorney fails to meet the third *Cohen* requirement of demonstrating that the sanctions order will be effectively unreviewable on appeal from a final judgment. *See Howard*, 90 F.3d at 436-37. This is a debatable issue, as manifested by the even split among our

sister circuits when the sanctioned attorney remains as an attorney in the underlying litigation. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits hold that a sanctioned attorney meets this third requirement. *See, e.g., Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95-96 (2d Cir.), *cert. denied*, 118 S. Ct. 337 (1997); *Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir.), *cert. denied sub nom. Steagall v. United States Dist. Court of Cent. Dist. of Ill.*, 118 S. Ct. 566 (1997); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 (11th Cir. 1992). Conversely, the First, Third, Fifth, Tenth, and Federal Circuits hold that a sanctioned attorney who remains as counsel in the litigation fails the third *Cohen* requirement. *See, e.g., In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394, 398 (Fed. Cir. 1993).

Today, the majority rejects the weight of authority, holding that a nonparticipating attorney, such as Cunningham, cannot take an interlocutory appeal of a sanctions order. Adopting the reasoning in *Howard*, the majority holds that in this circuit, a sanctioned attorney, whether participating or nonparticipating in the underlying action, must wait until the termination of that litigation to take an appeal of the sanctions order. In holding that adequate and effective appellate review is available at the conclusion of the case, the majority renders it impossible for nonparticipating sanctioned attorneys to satisfy the third *Cohen* requirement. Although I remain unpersuaded by the majority's view that nonparticipating attorneys must await the conclusion of the underlying action in order to appeal the sanctions order, I am bound by this new holding that review

is both available and effective when delayed until the conclusion of a case in which the attorney no longer has a role.

Having announced a new rule in this circuit, the majority suggests that its holding applies retroactively so as to bar a merits review of the issues Cunningham raises in this appeal. *See* Slip Op. at 9 & n.5. Because Cunningham did not file a notice of appeal upon the termination of the underlying litigation, retroactive application of the majority decision effectively bars any review of the district court's sanctions imposed upon her. The inequity of this result is patently obvious. When faced with a similar situation, the Tenth Circuit in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990), refused to impose such an unfair result on the attorney, explaining that

> the sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible, to foretell. Consequently, to apply our holding retroactively would be inequitable. . . . If we dismiss [the attorney's] appeal for want of jurisdiction, he will be remediless for the time has passed to file a new notice of appeal from the final judgment. While the aim of our holding--to effectuate the purposes of the final judgment rule--would not be hampered by its retroactive application, the small benefit we would gain by applying our holding retroactively does not outweigh the inequity which would result from such a determination. Accordingly, we conclude that our holding should not apply retroactively . . . .

Id. at 829-30. As in *G.J.B.*, principles of equity militate here against retroactive application of the majority's new rule and

compel this court to conduct a merits review of the issues Cunningham raises in this appeal.

For the foregoing reasons, I respectfully dissent.

DARWIN LEE STARCHER AND
KATHY BROWN, Plaintiffs,
TERESA CUNNINGHAM, Attorney-Appellant,
v.
CORRECTIONAL MEDICAL SYSTEMS, INC.
ET AL., Defendants-Appellees.

96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

August 5, 1998

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and discussion of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.